

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Federal-State Joint Board on)	CC Docket No. 96-45
Universal Service)	
)	
1998 Biennial Regulatory Review –)	CC Docket No. 98-171
Streamlined Contributor Reporting)	
Requirements Associated with Administration)	
of Telecommunications Relay Service, North)	
American Numbering Plan, Local Number)	
Portability, and Universal Service Support)	
Mechanisms)	
)	
Telecommunications Services for Individuals)	CC Docket No. 90-571
with Hearing and Speech Disabilities, and the)	
Americans with Disabilities Act of 1990)	
)	
Administration of the North American)	CC Docket No. 92-237
Numbering Plan and North American)	NSD File No. L-00-72
Numbering Plan Cost Recovery Contribution)	
Factor and Fund Size)	
)	
Number Resource Optimization)	CC Docket No. 99-200
)	
Telephone Number Portability)	CC Docket No. 95-116
)	
Truth-in-Billing and Billing Format)	CC Docket No. 98-170

COMMENTS OF VIRGIN MOBILE USA, LLC

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SUMMARY

Virgin Mobile believes that the proposal in this rulemaking violates the express terms of the governing statute. Virgin Mobile is also deeply concerned that the Commission's proposal creates an unfair and discriminatory burden on wireless carriers and fails to address the special administrative burdens of Universal Service contribution for prepaid wireless providers,¹ who are particularly adversely affected by the uncertainties of the present system that make accurate pass-through of charges to customers virtually impossible. Finally, the Commission's proposal also will unfairly burden low income and low usage customers, particularly those who use prepaid wireless services, thus frustrating some of the very policy aims of the Universal Service system. Virgin Mobile therefore urges the Commission to modify its proposal in four specific respects to address these deficiencies with the current proposal. Specifically:

1. Eliminate the blanket exemption of prepaid and IXC services.
2. Implement Sprint's approach of levying contributions at rates reflecting the relative interstate revenues of the various telecommunications industry sectors, which would require substantial reduction in the contribution levels expected of wireless providers.
3. Announce final contribution rates (if a percentage system is retained) at least 30 days in advance on a monthly, going-forward basis, so that carriers can program billing systems to decrement prepaid accounts or bill customers for USF contributions on a real-time basis.
4. If a monthly per handset assessment (at a rate readjusted to reflect a non-discriminatory assessment on wireline services) is implemented for wireless services, define an "active handset" as one that makes and/or receives calls in a given month and, in the case of prepaid services, has in its account an amount greater than the monthly assessment on a specified date during the month.

¹ Given that the Commission's proposal would exempt other classes of prepaid services, the administrative issue would be resolved for them.

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COMMENTS OF VIRGIN MOBILE USA, LLC

I. INTRODUCTION AND OVERVIEW

Virgin Mobile USA, LLC (“Virgin Mobile”), by its undersigned counsel and pursuant to the Commission’s Further Notice of Proposed Rulemaking and Report and Order released

February 26, 2002 (“*FNPRM*”),² hereby submits its Comments in the above-captioned proceedings.

A. About Virgin Mobile USA, LLC

Virgin Mobile will soon launch its offering of prepaid commercial mobile radio services (“CMRS”) as the first Mobile Virtual Network Operator (“MVNO”) in the United States. Virgin Mobile is a joint venture of Sprint PCS, whose technologically advanced wireless network Virgin Mobile will use, and of the Virgin Group, whose affiliates include the first MVNO, Virgin Mobile, PLC (“Virgin Mobile UK”), in the United Kingdom. Virgin Mobile expects that with its entry into the U.S. CMRS market, customers will receive better service and value than they are receiving from other telecommunications providers, as well as specialized content and innovative services targeted to youthful consumers. On its way to becoming the world's first global mobile telephone operator, Virgin Group has added fun and excitement to the wireless industry. In Great Britain, Virgin Mobile UK launched in November 1999 and now has several hundred thousand customers. On October 31, 2000, Virgin Group opened its doors in Australia in a partnership with Cable and Wireless Optus. Virgin Group development projects are underway in Singapore, Hong Kong, Taiwan, Japan, and continental Europe. Each of the Virgin Group companies around the world will offer distinctive services designed to meet the needs of local consumers.

B. Summary of Comments

Virgin Mobile offers these comments to address several key concerns that Virgin Mobile has with the *FNPRM*'s proposal for a new system for assessing contributions to the interstate

² *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, et al., *Further Notice of Proposed Rulemaking and Report and Order* (rel. Feb. 26, 2002) (“*FNPRM*”).

Universal Service Fund (“USF” or “Universal Service”). While Virgin Mobile has not yet been a participant in the U.S. market or a contributor to Universal Service, as a new entrant preparing to enter the U.S. market for the first time, Virgin Mobile has had to address USF issues in designing its billing and other back office systems. Virgin Mobile supports the Commission in its reform efforts to ease the extensive administrative burdens imposed by the current system and minimize additional costs to carriers and consumers. Unfortunately, the proposal offered by the Commission does not solve either problem.

First, Virgin Mobile believes that the proposal to exempt both prepaid services³ and interstate interexchange (“IXC”) violates the express terms of the governing statute, the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (the “Act”), concerning collection and administration of the USF system, which requires all common carriers to contribute to the USF. Second, Virgin Mobile is deeply concerned that the Commission’s proposal, by effectively exempting whole classes of carriers that are significant providers of interstate telecommunications service, creates an unfair and discriminatory burden on wireless carriers and customers generally, imposing contribution levels by between two and fourteen times more than the maximum current rates on a market sector whose focus is local rather than long distance service.⁴ Third, the Commission’s proposal fails to address the special administrative burdens of Universal Service contribution for prepaid wireless providers,⁵ who are

³ While Virgin Mobile would benefit from an absolute exemption as a prepaid provider, the *FNPRM* does not indicate that the exemption for prepaid providers was intended to extend to prepaid wireless services. Rather, it appears that the *FNPRM* assumes prepaid wireless providers would be assessed the proposed per handset fee. As discussed below, Virgin Mobile does believe that the USF system should take into account the special administrative burdens of prepaid providers, and it therefore offers several suggested options to address this problem.

⁴ See, p. 12, n.13, *infra*.

⁵ Given that the Commission’s proposal would exempt other classes of prepaid services, the administrative issue would be resolved for them.

particularly adversely affected by the uncertainties of the present system that make accurate pass-through of charges to customers virtually impossible. Finally, the Commission's proposal also will unfairly burden low income and low usage customers, particularly those who use prepaid wireless services, thus frustrating some of the very policy aims of the Universal Service system.

Virgin Mobile therefore urges the Commission to modify its proposal in the following ways:

1. Eliminate the blanket exemption of prepaid and IXC services.
2. Implement Sprint's approach of levying contributions at rates reflecting the relative interstate revenues of the various telecommunications industry sectors, which would require substantial reduction in the contribution levels expected of wireless providers.
3. Announce final contribution rates (if a percentage system is retained) at least 30 days in advance on a monthly, going-forward basis, so that carriers can program billing systems to decrement prepaid accounts or bill customers for USF contributions on a real-time basis.
4. If a monthly per handset assessment (at a rate readjusted to reflect a non-discriminatory assessment on wireline services) is implemented for wireless services, define an "active handset" as one that makes and/or receives calls in a given month and, in the case of prepaid services, has in its account an amount greater than the monthly assessment on a specified date during the month.

II. THE PROPOSED DISCRIMINATORY POLICY VIOLATES THE ACT

The *FNPRM* proposal cannot be implemented in a manner that complies with the Act. The Act requires that "[e]very telecommunications carrier that provides interstate telecommunications services shall contribute [to the Universal Service system] on an equitable and non-discriminatory basis..."⁶ This clause embodies two key principles of the Act. The first

⁶ 47 U.S.C. 254 (d).

principle, so-called “mandatory contribution,” requires that *all* telecommunications carriers providing interstate service must contribute. The second principle is non-discriminatory implementation of the Universal Service system. The *FNPRM* proposal fails on both grounds.

The Commission has the authority to interpret its governing statute when its language is ambiguous. It does not, however, have the authority to rewrite the plain text of the Act or to ignore the plain text when its meaning is clear. Because the *FNPRM* proposal does not comply with the requirements of the Act, adoption of the *FNPRM* proposal would be an *ultra vires* action.

First, the proposal does not collect contribution from all carriers providing interstate service. As noted above, certain interstate carriers are explicitly exempted from the contribution-based system. These include certain prepaid calling products and dial around companies. While the Commission has the power to exempt certain limited classes of carriers, such as *de minimis* providers of telecommunications services,⁷ the Commission should not pursue a contribution system that does not attempt to capture all carriers and then seek to justify the exemption based on the very exclusion from contribution. A similar example can be found in the *FNPRM*’s treatment of IXC’s. Under the current system, IXC’s are some of the largest contributors to USF, as many, if not most and the longest, interexchange calls, are interstate. Yet, under the *FNPRM* proposal, these carriers—who represent essentially the universe of interstate service apart from interstate access services—are exempted from contribution. The blatant non-conformance with the Act of the proposed exemption is hardly saved by the Commission’s expectation that IXC’s will contribute to USF to the extent that they have local exchange or special access operations — in other words, to the extent that they do not operate as IXC’s. Contrary to the plain directive of

⁷ 47 U.S.C. 254 (d).

the statute, a significant numbers of IXC's, as well as prepaid carriers that offer nothing but interstate long distance services, would be completely exempt from contribution, unless they provide some ancillary service involving a direct connection to an end user.

Curiously, the *FNPRM* proposal essentially makes USF a surcharge only on access services, be they switched access services from traditional LECs and wireless providers or special or dedicated access services. The proposal seeks to place the entire burden of USF contribution on but a limited portion of jurisdictionally interstate traffic, the portion consisting of the last mile between the end user and the IXC's Point of Presence ("POP"). This fact bolsters Virgin Mobile's argument that the *FNPRM* proposal cannot comply with the Act's requirement to assess USF contribution on *all* interstate telecommunications providers.

Second, the *FNPRM* proposal violates the Act's requirement that universal service contributions be non-discriminatory as between providers. As the Fifth Circuit noted, the requirement to create a non-discriminatory USF system is one of numerous principles that the Commission must consider in forming its USF policy. The *FNPRM* does not adequately address how this proposal is non-discriminatory as between all providers. As discussed in Section III, the proposal treats wireless carriers particularly harshly relative to their size and revenue, and harms wireless prepaid carriers particularly unjustly. In this way, the proposal fails to comply with the Act's requirement to create a non-discriminatory system because it fails to require contribution from all interstate carriers.

The *FNPRM* implies that the exclusion of interstate long distance and dial around is permissible on the grounds that these types of carriers would be *de minimis* contributors to the USF system. This flies in the face of the fact that numerous IXC's are large, not *de minimis*, contributors to USF under the current system. Further, the reasoning is circular. By defining

contributors as only those interstate telecommunications providers who have connections, the connection-based system exempts numerous providers from contribution because of the type of interstate service they provide. Applying the *de minimis* exemption to those carriers is merely attempting to offer an *ex post facto* justification of their exclusion from contribution in the first place, and is not a proper application of the *de minimis* exemption.

In apparent recognition of the economic efficiency of imposing substantial USF administrative burdens on limited carrier revenues, the Act does allow an exemption for a “carrier or class of carriers...if the carrier’s telecommunications activities are limited to such an extent that the carrier’s contribution... would be *de minimis*.”⁸ This language makes it clear that the *de minimis* nature of a potential contribution should derive from the limited nature of a carrier’s operations with a resulting limited contribution level. In contrast, the *FNPRM* proposal recommends a system that does not endeavor to distinguish between carriers based on the extent of their telecommunications activities, only the connections. To focus only on the level of contribution that a carrier has under a particular methodology and, only then, look at the carrier’s contribution to determine if it is *de minimis*, ignores the critical preliminary step of determining whether the system captures carriers with significant interstate operations.

Because the *de facto* blanket exemption of certain providers unrelated to the magnitude of their interstate activities and revenues is not contemplated by the only exception to the mandatory contribution obligation imposed by Congress, the blanket exemption impermissibly limits the categories of contributing carriers. Therefore, the *FNPRM*’s proposed system fails to meet the requirements of the Act and must be rejected. Instead, the Commission should consider the recommendations offered by Sprint, which would set contribution levels based on the relative

⁸ *Id.*

proportion of interstate revenues received by various telecommunications market sectors. Modifying the present system so that sector-based final percentage contribution rates are announced thirty (30) days in advance would solve many of the administrative problems of the current system and avoid the inequities that would follow adoption of the *FNPRM* proposal.

III. THE *FNPRM* PROPOSAL DOES NOT ADEQUATELY ADDRESS THE DIFFERENCES BETWEEN WIRELESS AND WIRELINE SERVICE

In the *FNPRM*, the Commission seeks comment on the efficacy of imposing a One Dollar (\$1) per month assessment for each handset of a mobile carrier.⁹ In so doing, the Commission erroneously assumes, however, that wireless and wireline carriers are roughly equivalent in their usage of the public switched network. The Commission's proposal would assess contribution only on the access portion of a wireline interstate call, rather than the interstate transmission of the call. However, for a wireless carrier, this distinction does not exist because it is likely that the wireless carrier will complete a call without ever providing "interstate access" to another provider. As a preliminary matter, the Commission should re-address what is an "active" handset for the purposes of USF contribution. Is an active handset one that places or receives voice calls during the month in question, one that has minutes available for use on a prepaid plan, or some other permutation thereof? The *FNPRM* proposes that an active handset should be one capable of making or receiving an interstate call.¹⁰ However, this definition is not easy to apply in the prepaid wireless context.

Virgin Mobile believes that an active handset should be defined as a handset that actually makes or receives voice calls during a calendar month, and actually places or receives calls above a non-*de minimis* amount, and, in the case of prepaid carriers, has an account balance at

⁹ *FNPRM* at Para. 46

least equal to the monthly assessment amount on the last day of the month. Further, to the extent that wireless phones are used exclusively or primarily for information services such as two-way text messaging, Internet access, or other services that are not purely telecommunications services, the phone should not be considered an “active handset.”

In its analysis, the Commission proposed that the determining factor in assessing whether a line was a residential or single line business or multi-line was which Subscriber Line Charge (“SLC”) was charged to end users.¹¹ This conclusion highlights a key problem with the analysis. In the common example of a wireline interstate long distance call, a Local Exchange Carrier (“LEC”) provides access service to IXC that, in turn provide the interstate transmission of the call.

A wireless carrier, on the other hand, often originates calls from its end users and completes them over its own network, without ever touching a third party or wireline network. Sometimes these calls are intrastate calls and sometimes they are interstate calls; but, in the context of such a wireless call, the wireless carrier does *not* receive access charges from an IXC and does *not* charge a SLC to its end users. Significantly, as a result, such calls do not provide wireless carriers with this additional revenue from customers or other carriers. Additionally, most wireless services are sold for a fixed price per number of minutes, and wireless carriers do not typically receive the incremental revenue for traffic that wireline carriers do.¹²

If the Commission were to move to a connection-based contribution for USF, Virgin Mobile believes that the principles advocated by Sprint should be adopted, and the proposed

¹⁰ *Id.*

¹¹ *Id.* at Para 53.

¹² This, therefore, exacerbates for wireless carriers the discriminatory impact on the level of USF contribution of the exemption of other categories of USF contributors.

connection assessment level should be substantially reduced. That the currently proposed One Dollar level is at least twice the *maximum* rate now paid by wireless carriers demonstrates its excessive level.¹³ In Sprint’s proposal, contributions will be assessed based on an industry sector’s relative income derived from the services. This approach is more sensible and equitable than the One Dollar (\$1) per connection proposal outlined in the *FNPRM*. A wireline connection is likely used as a primary line in a residence or business and can generate revenue for the carriers involved. Wireless phones tend to be secondary telecommunications connections and may not generate the same level of telecommunications services revenue, and should not be assessed as such.

When the Commission established the “Safe Harbor” for wireless companies, the intention was to assess an interstate percentage for wireless and wireline companies that was relatively similar — 15 percent. This percentage reflected that a wireless phone could have local, intrastate interexchange, and interstate interexchange services provided by the same carrier, and that wireless and wireline carriers should be treated similarly in terms of their relative level of USF assessment. Under the connection-based model, it is still necessary to preserve this equity between wireless and wireline carriers.

Virgin Mobile, because it has not commenced U.S. operations, does not have statistics to document its own proportion of local to interstate calls, but, given its targeted youthful customer profile, it would expect that, under the current system, it would have a proportion less than 15% of interstate to total calls. Nonetheless, should the Commission adopt a connection-based

¹³ See, *FNPRM* at Para 59, n.145. In addition to the calculation by Sprint using a n “average” consumer, if one considers a hypothetical low volume user, using a \$20 prepaid card over the course of 90 days, the USF charge under the proposed system is more than 14 times more than it is currently. This figure is reached by multiplying the \$20 by the safe harbor 15 percent, and then by the USF estimator of seven percent. This figure, \$.21, is more than 14 times greater than the \$3 in USF charges that the would be assessed over the course of a three month period.

system, Virgin Mobile would be willing to give up the opportunity for a lower contribution in return for the administrative simplicity of a connection-based system that allows for real-time pass-through to customers.¹⁴ It is fundamental, however, that the connection-based rate be set in an equitable manner. The level proposed in the *FNPRM*, however, far exceeds what would be a reasonable share for a wireless provider.

The Sprint proposal mitigates some of the unfairness inherent in the One Dollar (\$1) per connection proposal. Otherwise, wireless carriers will face an effective USF contribution that is a much larger relative portion of their overall revenues as compared to wireline carriers.

IV. THE *FNPRM* DISCRIMINATES BETWEEN WIRELESS AND WIRELINE PREPAID PROVIDERS

In addition to the discriminatory treatment for wireless carriers, as compared to wireline carriers generally, the Commission's proposal could be construed as particularly discriminatory as between wireless and wireline *prepaid* providers. The *FNPRM* specifically exempts prepaid carriers from contribution.¹⁵ Yet, the *FNPRM* does not specifically address whether this exemption applies only to wireline or also to wireless prepaid carriers. To that end, Virgin urges the Commission to specifically state that, if the exemption is retained (which Virgin Mobile believes it should not be), the exemption for prepaid carriers applies to all prepaid services, both wireless and wireline. Such an exemption could be warranted under the *de minimis* exception, particularly recognizing the special burdens placed on prepaid providers under the current system, whose retrospective, revenue-based approach makes collection from end-users on a pass-through basis virtually impossible.

¹⁴ Alternatively, Virgin Mobile would support a revenue-percentage system so long as the rates were set on a non-discriminatory basis and it was given a minimum of thirty (30) days' advance notice of the rate so that it could be collected on an administratively-efficient and accurate real-time basis from its customers' prepaid account balances.

When a consumer purchases a prepaid product, wireless or other, the product is rarely billed “per month.” In fact, many prepaid products are sold in dollar or minute increments. The result is that a customer can purchase the product and use it in a matter of days or over a series of months, depending on how intensive a particular customer’s usage is. This uncertainty makes it difficult, if not impossible, for a carrier to predict what level of Universal Service contribution might be assessed on the product if the Commission utilizes a per month per connection methodology, absent the modifications recommended above by Virgin Mobile.

If a carrier cannot determine the level of Universal Service contribution that its products will incur, carriers will not be in a position to properly price their products to cover these costs. Thus, in the hypothetical posed above, assuming the currently proposed One Dollar (\$1) per month per handset assessment, a prepaid wireless customer could incur either virtually no Universal Service obligations (assuming that a customer utilized a prepaid phone product entirely in a single calendar month) or several dollars, depending on how long the customer takes to exhaust the prepaid account. Because consumers are not billed for services, costs from regulatory charges (including USF) must be factored into the basic costs for the service. The uncertainty in the amount of charges that will be assessed makes it difficult for carriers to do so.

Virgin urges the Commission to clarify that all prepaid products, wireless, and wireline would be exempt from contribution under the proposed system if a prepaid exemption is implemented. Virgin believes that this approach fairly addresses the similarities between the products in that both types of prepaid carriers do not have an ongoing billing relationship with their customers. Regardless of the approach that is implemented, and assuming the relative fairness of the rate, the USF system should be run in such a manner as to allow *all* carriers to

¹⁵ *Id.* at Para. 68.

pass the USF surcharges through to customers. This pass-through will not be possible for prepaid wireless carriers under a per connection system unless modified as recommended by Virgin Mobile.

V. THE CONNECTION-BASED POLICY WILL HARM LOW INCOME AND LOW USAGE CONSUMERS BY DRAMATICALLY RAISING THE COST OF WIRELESS SERVICE

Ironically, the connection-based contribution system may be most detrimental to the availability of certain telecommunications services, especially wireless services, to low income and low usage consumers. Prepaid services are often the means by which typically under-served consumers, many with low incomes or limited or poor credit histories, receive their initial access to some telecommunications services. As such, these consumers may find it difficult to receive access to a pre-subscribed service. As noted above, the lack of an ongoing billing relationship with a prepaid customer means that a prepaid provider cannot effectively pass through any monthly charge associated with the connection, and must attempt to cover any regulatory related costs in its basic rate structure. Thus, a prepaid consumer will likely pay significantly more than a corresponding post-paid product. Given the demographics of the prepaid industry, this result will most likely adversely affect the availability of these services to lower income consumers — some of the same persons who the USF system is designed to assist.

Additionally, consumers that use services sparingly (for instance, end-users who maintain a wireless phone for periodic “emergency” usage), will likely bear a relatively high portion of the USF burden if carriers pass through the charges to the end users, as most continue to do. In the context of a wireless product, these consumers might have a low usage plan at a low cost, and might make virtually no long distance use of it. For a prepaid wireless provider, these people might purchase a collection of minutes and not use them for several months. In both cases, these

consumers will pay excessively, relative to their usage.¹⁶ These consumers are often on a relatively limited budget for telecommunications services and maintain the service only for its utility during times of personal or national crises, and chiefly for local service. These consumers cannot easily absorb the drastic price increases that an impermissibly high, discriminatory contribution-based system may cause, and may decrease their usage of the products accordingly. How tragic it could be if a system designed to further ubiquitous telecommunications services actually discouraged consumers from purchasing these services.

VI. CONCLUSION

Virgin Mobile urges the Commission to re-think the *FNPRM* proposal in light of Virgin Mobile's suggestions, particularly with respect to prepaid wireless services and the elimination of the blanket exemption of certain categories of carriers. The *FNPRM* proposal to collect exclusively on a local connection basis places the entire burden of USF contribution on the so-called "last mile" carriers, unlawfully exempting long-haul and certain casual calling providers. Further, it does not adequately account for the differences between the wireless and wireline industries, and, therefore, seeks to collect from the two sectors at drastically different relative levels. Further, the proposal manages to offer an explicit exemption to certain prepaid providers without providing similar exemptions to wireless prepaid carriers. It also unfairly penalizes low-volume wireless consumers. As proposed, the Commission's proposal fails to solve the numerous problems in the USF system and potentially adds many more.

The *FNPRM* proposal has some administrative simplifications, but these are insufficient to overcome the fact that the proposal is a USF contribution scheme that is discriminatory,

¹⁶ As noted above, it is the uniform of assessment of a per handset charge, without regards to volume that creates a more significant effective marginal rate of USF surcharges on lower volume customers. *See*, n.13, *supra*.

confusing, contradictory, and violative of the Act. The Commission should eliminate the unlawful blanket exemptions and adopt a plan that correctly accounts for the differences between wireless and wireline services in a manner similar to the plan proposed by Sprint. Further, the Commission should implement Virgin Mobile's suggested approaches to USF administration that allow pass-through of charges to end users on a real-time basis. These would make collection more efficient and minimize the need for higher charges paid by end-users to cover the unnecessary and excessive administrative costs and lost pass-through revenues endemic under the current system.

Respectfully submitted,

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